

Decision **DRAFT DECISION OF ALJ BUSHEY** (Mailed 5/28/2002)

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Investigation of USP&C to Determine Whether it has Violated Public Utilities Code Section 2889.9 by Failing to Provide Commission Staff with Requested Information and Whether the Commission Should Order California Telephone Companies to Cease Providing Billing and Collection Services to USP&C.

Investigation 99-10-024  
(Filed October 21, 1999)

**O P I N I O N**

**1. Summary**

This decision denies Greenlining Institute and Latino Issues Forum (Greenlining/LIF) an award of compensation for its participation leading to Decision (D.) 01-04-036. We do so because Greenlining/LIF did not satisfy the statutory requirement of making a “substantial contribution” to the Commission’s decision, consistent with Pub. Util. Code Sections 1801 – 1812.<sup>1</sup>

**2. Background**

To understand why we conclude that Greenlining/LIF did not substantially contribute to D.01-04-036, it is necessary to give some detail regarding the issues in this investigation and the procedural steps to resolve it. As will become clear, Greenlining/LIF did not contribute to the resolution of their issues. Instead, its efforts in the proceeding were chiefly directed at

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<sup>1</sup> All statutory citations are to the Public Utilities Code.

broadening the investigation to include violations of the Business and Professions Code to add an additional respondent, which we declined to do.

This proceeding concerns allegations by the Commission's Consumer Services Division (CSD) that USP&C, Inc. (USP&C) had engaged in telephone billing practices that violate Sections 2889.9 and 2890, most notably by billing for products or services whose purchase had not been authorized by the billed subscriber. CSD further alleged that: (1) USP&C had violated Section 2889.9 by failing to provide CSD with requested information; (2) USP&C had violated Section 2890 by failing to provide "clear and concise descriptions of all products being billed;" and (3) USP&C had violated Section 2890 by failing to include on the bill the "name of the party responsible for generating the charge."

On November 9, 1999, Greenlining/LIF filed a motion seeking intervenor party status. Respondent USP&C, CSD, Greenlining/LIF, and Pacific Bell Telephone Company (Pacific) also entered appearances at the Prehearing Conference on December 1, 1999. Greenlining/LIF's motion to intervene was orally granted by the assigned Administrative Law Judge (ALJ).

During the Prehearing Conference, a question arose as to the scope of the Order Instituting Investigation (OII). Counsel for USP&C expressed concern that Greenlining/LIF intended to exceed the scope of the investigation as articulated in Ordering Paragraph 1 of the OII. The assigned Commissioner responded, stating that while the Commission welcomes the active participation of intervenors in Commission proceedings, the OII clearly outlines the issues to be resolved. The Commissioner added that if an intervenor believed that the public interest would best be served by investigating issues beyond the scope of the OII,

the way to do so would be to petition the Commission to initiate a separate proceeding.<sup>2</sup> The ALJ agreed with the Commissioner's clarification that the scope of the proceeding be limited to the OII's specification of alleged violations of Sections 2889.9 and 2890 by USP&C. Greenlining/LIF declined to heed these Commissioner's comments and suggestions, and instead pursued further attempts at broadening the scope of the OII to have Pacific named as a respondent and to include possible violations of the Business and Professions Code.

On December 29, 1999, Greenlining/LIF filed a Notice of Intent (NOI) to seek compensation alleging that both groups met the statutory eligibility criteria, although it deferred the requisite showing of financial hardship until the time of filing a request for an award of compensation, pursuant to Section 1804(a)(2)(B). Greenlining/LIF acknowledged that a finding of eligibility "in no way ensures compensation." USP&C responded to the NOI, and Greenlining/LIF replied to this response.

On February 11, 2000, the ALJ issued a ruling addressing issues raised in the NOI, USP&C's response and Greenlining/LIF's reply. The ruling noted that Section 1804 expressly limits compensation award funding to public utilities.<sup>3</sup> Because billing agents are not subject to the intervenor compensation statutes,

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<sup>2</sup> Tr. pp. 29-31.

<sup>3</sup> We note that there are at least two types of entities against whom complaint proceedings may be brought at the Commission but who are not explicitly covered by the intervenor compensation statute: billing agents (such as Respondent USP&C) and mobilehome parks. Due to this gap, a customer may prevail in a complaint at the Commission against such an entity but lack a public utility source from which to seek an award pursuant to the statute.

Section 1804(b)(2) “would appear to preclude the Commission from subjecting USP&C to funding an award.” The ruling cautioned Greenlining/LIF that the absence of a public utility respondent to fund an award of compensation might affect its obtaining an award.

On April 11, and 12, 2000, the ALJ conducted evidentiary hearings. CSD and USP&C presented witnesses. Greenlining/LIF participated by cross-examination. Following the conclusion of the hearings, the parties, other than Pacific, filed initial briefs, and all parties filed replies.

On October 20, 2000, the ALJ issued the Presiding Officer’s Decision (POD). USP&C, Pacific, and CSD appealed the POD; Greenlining/LIF filed a response to the appeals. In April 2001, the Commission issued D.01-04-036, which found that USP&C violated Section 2890(e)(2)(A) and (B), and imposed a fine of \$1,750,000. The Commission also approved a partial agreement between CSD and USP&C, under which USP&C incurred an additional fine of \$43,000 for failure to promptly provide information that CSD had requested.

The Commission ordered all Local Exchange Carriers (LEC’s) permanently to cease providing USP&C billing and collection service. The Commission also ordered USP&C to show cause why it (1) should not be required to disgorge all amounts retained from unauthorized billings, and (2) should not be fined for failure to comply with Sections 2889.9 and 2890. Finally, the Commission required Pacific Bell to enforce its Billing and Collections tariff to the letter and to modify it to preclude a practice known as “dilution.”<sup>4</sup>

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<sup>4</sup> Approximately half of the customers billed by USP&C disputed the charge or demanded a refund. USP&C’s stated plan to lower this rate was to obtain other billing customers with lower refund rates to “dilute” the unacceptably high rate.

USP&C filed an application for rehearing of D.01-04-036, and failed to pay the ordered fine.

### **3. Request for Compensation**

On June 22, 2001, Greenlining/LIF filed a request for an award of compensation seeking \$63,108.18,<sup>5</sup> for participation in this proceeding.

On July 16, USP&C responded stating that the Commission had no basis for imposing any intervenor compensation award on USP&C because:

1. The intervenor compensation statutes, Sections 1801-1812, may only be enforced against a “public utility” as defined in Section 216, and USP&C is a “billing agent,” not a “public utility;”
2. Sections 2889.9 and 2890 do not expressly authorize the Commission to impose an intervenor compensation award against billing agents such as USP&C;
3. The Commission does not approve USP&C’s rates and therefore cannot set a rate allowing USP&C to fully recover the amount of an award from ratepayers within one year of the date of the award as required by section 1807; and
4. Greenlining/LIF was not a “customer” of USP&C and Greenlining/LIF failed to make a “substantial contribution to” this proceeding.

Pacific also responded to the Greenlining/LIF request, stating that the Commission could not order it to fund an intervenor compensation award because Pacific was not a respondent in the proceeding. Pacific contended that

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<sup>5</sup> Footnote 8 on p. 8 of the request noted that an addendum or errata would be filed reflecting the itemized hours and allocation by issue for work performed by Susan E. Brown (Brown). That errata, filed on July 17, 2001, waived the hours of Brown in this proceeding. The effect of the waiver reduces the amount requested by \$2,600. Thus, the total amount requested by Greenlining/LIF in this proceeding is \$60,508.68.

Greenlining/LIF had failed to make a substantial contribution, and that it sought hourly rates which were excessive.

Replying to USP&C's and Pacific's responses, Greenlining/LIF argued that USP&C was the equivalent of a public utility, and that the Commission has previously rejected USP&C's ratemaking argument. Greenlining/LIF stated that its intervention led to a remedy that "addressed the relationship between the LEC and USP&C," as well as other directives to the LECs in this decision. Greenlining/LIF also stated that its cross-examination "elicited important contextual evidence reflecting the scope and nature of USP&C's fraudulent conduct."

#### **4. Requirements for an Award of Compensation**

Intervenors who seek compensation for their contributions in Commission proceedings must file requests for compensation and meet the statutory requirements for the grant of such awards pursuant to Sections 1801-1812. An intervenor must first establish eligibility to participate by a showing, among other things, that it is a "customer" as defined in Section 1802(b) and then, must make a "substantial contribution" to the Commission's decision. Section 1802(h) provides:

"Substantial contribution" means that, in the judgment of the commission, the customer's presentation has substantially assisted the commission in the making of its order or decision because the order or decision has adopted in whole or in part one or more of the factual contentions, or specific policy or procedural recommendations presented by the customer. Where the customer's participation has resulted in a substantial contribution, even if the decision adopts that customer's contention or recommendations only in part, the commission may award the customer compensation for all reasonable advocate's fees, reasonable expert fees, and other

reasonable costs incurred by the customer in preparing or presenting that contention or recommendation.”

## **5. Greenling/LIF’s Contribution to Resolution of the Issues**

Greenlining/LIF states that as to USP&C, it took depositions, conducted extensive discovery, filed a motion to compel discovery and reviewed the information produced by USP&C, participated in the evidentiary hearings, filed a post-hearing brief, and filed a response to USP&C’s appeal. As to Pacific, Greenlining/LIF states that it urged the Commission to name Pacific as a respondent to the OII, conducted limited discovery, and urged the Commission to enforce existing rules and laws designed to protect consumers from unauthorized charges.

Greenlining/LIF claims to have represented low-income and minority customers who are “most often victimized by the practices” at issue in the proceeding. Greenlining/LIF states that it did not duplicate the efforts of CSD because CSD did not focus on Pacific. As to USP&C, Greenlining/LIF asserts that it “filled in parts of the factual record not established by CSD.”

Greenlining/LIF, however, offered no citations to the record to support its assertion. Having presented no witnesses, and offered no exhibits, it is not clear how Greenlining/LIF could have supplied factual evidence for the record.

A careful review of the record leads us to conclude that Greenlining/LIF simply did not prevail on any issue or otherwise contribute to our reasoning in resolving the investigation. (*See* Attachment A.) Greenlining/LIF’s effort to have Pacific named as a respondent was unsuccessful. The Commission’s directions to Pacific in D.01-04-036 (to strictly enforce its billing and collections tariff) was a reminder to Pacific of its pre-existing obligation. We further note that the only new direction to Pacific, to modify its tariff to preclude a practice known as “dilution,” was not advanced by Greenlining/LIF.

Greenlining/LIF also asserts that USP&C is a public utility as defined by Section 216, and as such required to pay intervenor compensation awards, subject to Section 1807. Since Greenlining/LIF has not made a substantial contribution to this proceeding, the Commission's authority to order a billing agent to fund an award of compensation is an issue we need not reach today.

Like Greenlining/LIF, we want to protect the interests of vulnerable low-income and language minority customers. We note, however, that Greenlining/LIF did not sponsor any witness claiming to have been a victim of the practices of USP&C, nor did Greenlining/LIF present evidence that USP&C targeted any discrete group of customers for unauthorized charges. Even limited participation in Commission proceedings will satisfy the statutory requirements if it leads to a substantial contribution to the Commission's decision on at least one substantive legal issue. However, Greenlining/LIF's failure to make a substantial contribution precludes the Commission from granting it an award of compensation in this proceeding.

## **6. Comments on Draft Decision**

The draft decision of ALJ Maribeth Bushey in this matter was mailed to the parties in accordance with Section 311(g) and Rule 77.7 of the Rules of Practice and Procedure. No comments were filed.

## **Findings of Fact**

1. Greenlining/LIF sponsored no witnesses and offered no exhibits.
2. Greenlining/LIF made no argument that was adopted by the Commission.
3. Greenling/LIF's participation in this proceeding was devoted chiefly to advocating changes to the scope of the proceeding as set forth in the OII and in rulings.



**Conclusions of Law**

1. Greenlining/LIF did not contribute substantially to the Commission's resolution of issues in D.01-04-036.
2. Greenlining/LIF has not fulfilled the requirements of Sections 1801-1812 of the Public Utilities Code, which govern the award of intervenor compensation.
3. Greenlining/LIF's request for an award of compensation for contribution to D.01-04-036 should be denied.

**O R D E R**

**IT IS ORDERED** that the request of Greenlining Institute and Latino Issues Forum for an award of compensation for contribution to Decision 01-04-036 is denied.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.

## **ATTACHMENT A**

### Attachment A

#### Analysis of Greenlining/LIF Contribution To Resolution of Issues

<b>Recommendations in Greenlining/LIF Opening Brief</b>	<b>Outcome</b>
Survey USP&C Customers to determine percentage of unauthorized charges	Not adopted.
Order USP&C and Pacific Bell to disgorge profits	No action taken against Pacific Bell; USP&C fined.
Fine USP&C; investigate Pacific Bell	No action taken against Pacific Bell; USP&C fined.
Make tariff complaint thresholds mandatory cutoffs for LEC billing access	Not adopted.

<b>Greenlining/LIF Claim of Substantial Contribution<sup>6</sup></b>	<b>Evaluation of Claim</b>
“Remedy that addressed the relationship between the LEC and USP&C”	Too vague to evaluate, no discernable effect on remedies.
LECs cease billing for USP&C	Originated in OII, OP 1.d., not in Greenlining/LIF filings.
Billing agents must provide information (OP 8)	Originated in POD, not in Greenlining/LIF filings.
General requirement not to bill for unauthorized services	Not adopted in this decision.
Pacific required to rewrite tariffs	Originated in POD, not in Greenlining/LIF filings.

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<sup>6</sup> As set out in Greenlining/LIF Reply to USP&C’s Response opposing compensation request.